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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 95-92
Regulations Governing Programming)	
Practices of Broadcast Television)	
Networks and Affiliates)	DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these reply comments in the above referenced docket. MAP and others have shown that the rules at issue here remain vital, while those in favor of repealing them have shown no public interest reason to do so. The right to reject rule, time option rule, exclusive affiliation rule, and territorial exclusivity rule all continue to promote diversity, competition, and service to local communities.¹ In short, there is no reason to modify or repeal them.

I. INTRODUCTION

The three traditional networks have taken an approach to the issues in this proceeding which presumes facts that do not exist in the real world. For example, they claim that networks no longer dominate affiliates, and that therefore, "there is no longer any conceivable public interest reason for the Commission to micromanage relations between" them. Comments of National Broadcasting Company Inc. at 4 ("NBC Comments"). Their support for this claim includes the increase in the number of networks, NBC Comments at 11; Comments of Capital Cities/ABC Inc. at 6 ("ABC Comments"), the increase in subscribers and number of homes passed by non-broadcast video, ABC Comments at 14, and the flurry of recent affiliation switches

¹As discussed in MAP's comments, it does not oppose the Commission's proposal to repeal the dual network rule. MAP Comments at 2-3.

triggered by the Fox-New World deal. NBC Comments at 11-12; ABC Comments at 6.

But MAP and others have already shown that the network commenters assume a level of competition that simply does not exist. Programming from ABC, CBS, NBC, and Fox still has much higher ratings than that of UPN or WB, and therefore offers affiliates a much more valuable asset. *See Comments of Media Access Project at 7 n.8 ("MAP Comments")*. Furthermore, it is a leap of logic and faith to magnify the recent New World-Fox affiliation into conclusive proof that the roles of networks and affiliates have been equalized in any lasting sense. MAP Comments, Review of the Prime Time Access Rule, MM Docket No. 94-123 (filed Mar. 7, 1995) at 7-9 ("MAP PTAR Comments"). Finally, while cable and other multichannel video providers do add to the programming supply, they do not even approach network programming either in terms of actual ratings or potential audience reach. MAP PTAR Comments at 16-20; Rich Brown, *USA tops basic for third quarter; basic cable networks 1995*, Broadcasting & Cable, Oct. 9, 1995, at 55 (Ratings for all basic cable networks were up for third quarter, but still less than the total ratings for ABC, CBS and NBC in cable-only homes). As vertically-integrated, national sources, they do not add much in terms of program diversity and they cannot supply programming which serves individual, local communities. *See MAP PTAR Comments at 24-27; NOPR at ¶10.*

While it may be the case, as ABC suggests, that cable systems are providing a modicum of local news and public affairs programming, ABC Comments at 14-15, this has hardly become a major source of information. As ABC itself readily admits, these news feeds are often supplied by local broadcast stations and do not add another viewpoint or editorial voice. Moreover, this news programming is primarily available in the very largest markets, and thus provides no benefit

at all for the vast majority of viewers affected by these rules.² And inasmuch as cable operators already purport to exercise editorial control over their systems, they do not *add* a voice by providing news programming. In any event, and perhaps most importantly, it is pure folly to suggest, as ABC does, that it is worth undermining a longstanding, well-established system of vibrant, independent editorial control by licensees in exchange for a single cable channel and/or five-minute news inserts.

If the Commission adopts every position advocated by the big three networks in this and all recent related proceedings,³ the result will be virtually indistinguishable from outright network ownership and control of local broadcasters:

- Networks would have the ability to offer new prime time programming in which they have an ownership interest during all four prime time viewing hours. *Evaluation of the Financial Interest and Syndication Rules*, 8 FCC Rcd 8270 (1992) ("*FISR Order*") *aff'd Capital Cities/ABC v. FCC*, 29 F.3d 309 (7th Cir. 1994); Report and Order, *Review of the Prime Time Access Rule*, (released July 31, 1995), MM Docket No. 94-123 ("*PTAR Order*").
- Networks could create options to monopolize blocks of time, at their sole discretion and with no notice, during the rest of the affiliate's programming day. *NOPR* at ¶32.
- In addition to their own programs, networks will also directly syndicate to their affiliates both off-network and first-run non-network programming. *See FISR Order; PTAR Order*.

²Indeed, the localities cited as examples by ABC include markets such as New York, Los Angeles, and Chicago. ABC Comments at 14 n.36. These markets would not be affected at all by repeal of the rules since they are served by four network owned-and-operated stations, not affiliates.

³See Notice of Proposed Rulemaking, Broadcast Television Advertising, MM Docket No. 95-90 (released June 14, 1995) ("*Affiliate Advertising NOPR*"); Notice of Proposed Rulemaking, Filing of Television Network Affiliation Contracts, MM Docket No. 95-40 (released April 5, 1995) ("*Affiliation Contracts NOPR*").

- Networks could directly restrict, or mount challenges which discourage and delay⁴ affiliate attempts to reject network programming, and they could completely preclude affiliates from carrying shows owned by or distributed by a competing network. *NOPR* at ¶¶25, 37. Even when they cannot prevent an affiliate from preempting programs, they can still retaliate for too many preemptions by terminating the affiliation agreement. *See NOPR* at ¶48.
- Networks could cut off an important source of programming advice by replacing independent spot advertising sales representatives. *See Affiliate Advertising NOPR*.
- Networks could lock affiliates into these terms with contracts of ten-year duration, thereby minimizing the station's ability to switch affiliations. *Network Affiliation Agreements*, 4 FCC Rcd 2755 (1989). Furthermore, as onerous as the terms of these contracts might be, they can carry out the negotiations in total darkness, because there would be no requirement to file these agreements with the Commission for public inspection. *See Affiliation Contracts NOPR*.

II. RIGHT TO REJECT RULE

It is ironic that the networks claim that they do not want to curtail their affiliates' ability to serve the needs of their communities of license. *See, e.g., ABC Comments* at 7-8. Indeed, the proposed clarification of the rule would do exactly that. Yet the networks say they need this modification to ensure that they can compete in the programming market of the future. For example, ABC makes the startling claim that if affiliates had the right to reject network programming for economic reasons, the network system would be "undermined - indeed, destroyed." *ABC Comments* at 16.

These claims are unconvincing, since network profits have been sky-high in recent months. *See Combined revenues of Big 3 TV networks*, *Communications Daily*, Nov. 14, 1995, at 7. This

⁴"Economic preemption" will be notoriously difficult to define and may therefore open a floodgate of litigation. *MAP Comments* at 4.

is true even though the right to reject rule has existed for years without this limiting clarification.

In fact, there has been little public outcry to repeal the right to reject rule until now.

In any event, the networks' actions speak louder than their words. In private contract negotiations, they have already imposed harsh termination clauses on *any* preemption by affiliates. See *NOPR* at ¶48. Those penalties presumably drew no distinction between preemptions which were economic-based and those which were for "bona fide public interest" reasons. This shows that the networks' true goal is to prevent any and all affiliate preemptions.

CBS's assertion that the Commission should forbid preemptions by local affiliates wanting to carry local sports and entertainment programs, Comments of CBS Inc. at 19-21 ("CBS Comments"), is even more stark proof of its intentions. CBS cannot seriously claim that it still cares about an affiliate's ability to serve the community when it would not let that affiliate carry a local high school's homecoming game or a concert by the local symphony. By urging the Commission to eliminate a category which comprises 41% of all preemptions - in addition to the proposed limitation on "economic preemptions" - CBS is advocating two exceptions that will swallow the rule.

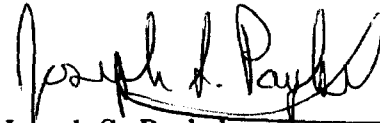
In any event, far from being a constraint on the workings of the free market, the right to reject rule can operate as a valuable market-based source of feedback which will encourage networks to improve the quality of their programming. Networks seeking affiliate clearances can either create shows that viewers will watch and that affiliates will have a financial incentive to carry, or they can use agency regulations and contractual power in a manner that handcuffs the affiliates from declining any and all programming, regardless of poor quality. If they are successful in handcuffing affiliates, they may be guaranteed nationwide clearances, but there will

be no incentive for them to improve the quality of shows. In addition to preserving the affiliates' ability to serve their local communities, therefore, affiliate preemption can send a powerful message.

CONCLUSION

MAP has shown that the proposed changes to four of the five rules under examination in this proceeding would not only be detrimental to the competitive balance between affiliates and the networks, but will seriously jeopardize the affiliates' abilities to program in a manner which is responsive to their communities of license. These costs far outweigh the claims by the networks that, even though their profits are strong and continue to rise, they need to be assured of maximum clearances for the maximum amount of dayparts so they can remain competitive. With these rules in place, the networks have and will continue to survive quite well. But without them, the public interest in local programming may not.

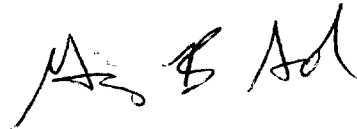
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